



## State of Idaho

# DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER  
Governor

DAVID R. TUTHILL, JR.  
Director

RECEIVED

SEP 17 2007

September 13, 2007

Dave Nelson  
5688 Chilly Rd  
Mackay, ID 83251

Department of Water Resources  
Eastern Region

Re: Your Correspondence Regarding Congdon Springs Creek and Water District 34 Water Distribution Rules

Dear Mr. Nelson,

I have reviewed your correspondence regarding the above referenced issues. The Department received your letter on August 17, 2007. Thank you for putting your concerns in writing and allowing me the opportunity to respond more effectively. Your letter asks that I respond to two separate issues. The first issue concerns water use by John Lezamiz (Lezamiz) on Congdon Springs. The second issue concerns what appears to be an on-going disagreement over interpretation of one of the Water District 34 Water Distribution Rules. I will address both issues in the order presented in your letter.

### **Congdon Springs Issue:**

I have asked staff and the Water District 34 watermaster to investigate and respond to the points you have raised about use of water from Congdon Springs by Lezamiz. The following information has been reported to me:

- Department staff from Idaho Falls visited the Lezamiz diversion sites on Congdon Springs Creek earlier this summer. Ernie Carlsen sent correspondence to Mr. Lezamiz on June 21, 2007 that required Mr. Lezamiz to cease further diversion of his water rights from Congdon Springs and Congdon Springs Creek at the new pump station on the creek since that pump is not recognized as a valid point of diversion under his water rights from those sources. Separate correspondence was sent to the watermaster instructing him not to deliver the Lezamiz Congdon Springs/Congdon Springs Creek water rights at the new pump station until Lezamiz gets approval from the Department. The watermaster was further instructed to prevent the re-diversion of the Lezamiz ground water right at the pump station.
- On June 26, 2007, Lezamiz submitted an Application for Temporary Change of Water Rights (TC-34-80). That application proposed using the pump station as the point of

diversion of the Lezamiz Congdon Springs water rights 34-232, and the re-diversion point of Lezamiz ground water right 34-2350, as well as change or rearrange the place of use for both rights. The temporary change application also sought to change the point of diversion and place of use for a portion (0.93 cfs) of ground water right 34-7076. The Department approved the temporary change application on June 29, 2007 for a total of 131 acres in Section 31, Township 7 North, Range 31 East. Approval of the temporary change application authorized use of the new Lezamiz pump station as the legal point of diversion for the Lezamiz Congdon Springs right, 34-232 (0.80 cfs), as well as a legal point of re-diversion for ground water right 34-2350 and 0.93 cfs of ground water right 34-7076.

- The Lezamiz Congdon Springs right 34-232 and ground water right 34-2350 authorize the total combined irrigation of 84 acres in the E1/2NE1/4 and NESE of Section 31, T 7 N, R 31 E, not 69 acres as asserted in your letter.
- Field visits and other information available to the Department confirms that Lezamiz is diverting water to four pivots in Section 31, including one mini-pivot circle, two mini-windshield pivots, and approximately one half-circle windshield pivot. Based on review of satellite imagery from July of 2007, it appears that the total irrigated acreage under these four pivots is about 130 acres, or the amount of acres authorized by the temporary change application.
- The difference between the acres authorized by water rights 34-232 and 34-2350 and the acres authorized/irrigated under the temporary transfer is about 47 acres. This difference is attributed to the acres temporarily transferred under right 34-7076 owned by Three In One Ranch LLC (Three In One), of which Lezamiz has an ownership interest.
- The half-circle windshield pivot, or the largest of the four pivots located in the SENW and SWNE of Section 31, is on land that was not included on any water rights owned by Lezamiz prior to approval of the temporary transfer. This land however is included in the service area and place of use description for all of the Big Lost River Irrigation District (BLRID) water rights. Based on review of aerial photos and satellite imagery on record at the Department, the land appears to have been irrigated during several of the last ten years, and most recently in 2005. We believe therefore that Lezamiz has a right to use BLRID storage water on this land. As a result, the owner can temporarily transfer other water or water rights to the land during a drought declaration if the storage supply is inadequate.
- Lezamiz installed a flow meter at the new Congdon Springs pump station authorized by the 2007 temporary change approval. A condition of approval of the 2007 temporary change application required Lezamiz to measure the water diverted under the approval. The watermaster measured the pump station on July 9<sup>th</sup> using the water district's portable flow meter and obtained a measurement of 1044 gallons per minute (gpm) or 2.32 cubic feet per second (cfs). The watermaster observed that all four Lezamiz pivots were running with end guns on. The Lezamiz flow meter measured only 567 gpm, an

error of 477 gpm or 46%. The watermaster reports that the flow meter operates very erratically and is either not operable or not reliable.

- On or around July 1<sup>st</sup>, an assistant watermaster for Water District 34 measured the ground water well that injects to Congdon Springs Creek and found the well to be flowing at 990 gpm (110 inches or 2.2 cfs). The watermaster observed that all four Lezamiz pivots were running at this time with end guns on.
- From July 9 to July 12, the watermaster had measured the flow of Congdon Springs to be about 0.80 cfs or 359 gpm. Based on these measurements and the measurements of the Lezamiz well and re-diversion pump, it does not appear that the re-diversion pump was diverting more water than authorized under the approved temporary change, nor was it diverting more water than the combined amount of water entitled under the Lezamiz ground water right 34-2350 (1.6 cfs) and the Lezamiz Congdon Springs right (0.80 cfs). It appears in fact that given the authorization to divert additional ground water at the Lezamiz well, a minimum of only 0.1 cfs of the Congdon Springs water was being re-diverted at the Lezamiz pump during this period. The remaining Congdon Springs water was not diverted and would have been available to benefit downstream users.
- The watermaster reported to the Department on August 21 and August 28 that the Lezamiz pump station is only diverting the amount of ground water that is injected to Congdon Springs Creek, less conveyance loss, under ground water right 34-2350 and the portion of ground water right 34-7076 authorized under the temporary transfer. The watermaster reports that two of the four Lezamiz pivots, including the large half-circle pivot, have been turned off for the season. The Congdon Springs water was not being re-diverted at the Lezamiz pump, and there may have been additional ground water in the creek not being re-diverted at the Lezamiz pump. The watermaster stated that much of the remaining flow in the creek from Congdon Springs and any additional ground water is naturally lost in the creek channel and diversion ditch before reaching the other downstream Congdon Springs water users.
- The watermaster reports that none of the other diversions on Congdon Springs channel have measuring devices or adequate head gates. Both the Department and the watermaster expect that all water users on the creek have adequate measuring devices and head gates installed prior to the ensuing irrigation season. The watermaster stated that there is an installed weir that measures the discharge of the Lezamiz ground water well before it is injected to Congdon Springs Creek.
- The Department's letter of June 21<sup>st</sup> to Lezamiz requested Lezamiz to change the alterations that Lezamiz made to the structure at the old point of diversion from Congdon Springs due to concerns that the structure was ponding or backing water up the channel. The Department expects Lezamiz to make this change after the irrigation season.
- On August 31, 2007, the watermaster measured a discharge of 1004.4 gpm (2.24 cfs) from the Lezamiz well using the Water District's portable flow meter. The weir that is

used to measure the well water before it discharges to Congdon Springs was read by the watermaster at 992.3 gpm (2.11 cfs). The watermaster reported that the well has no control valve. The Lezamiz re-diversion pump from the Congdon Springs channel was measured at 326.6 gpm (0.73 cfs) using the district's portable meter. The installed meter on the re-diversion pump was not recording a flow and thus was not operational. The watermaster observed that the re-diversion pump was providing water to two of the four pivots. The two Lezamiz pivots on were the two smallest pivots. The watermaster also measured the flow of Congdon Springs using a temporary weir near the Burnett Ditch and measured a flow of about 1.55 cfs. Given these measurements, about 2.93 cfs should have been available in the Congdon Springs channel for appropriation or use by other uses, less any natural channel losses.

I agree with the assertion in your letter that a water user must seek approval of water right point of diversion and place of use changes before implementing such changes and not afterward. Ernie Carlsen's June 21<sup>st</sup> letter further affirms the Department's position on that question. However, the temporary change application afforded the user in this case a means in which to make legal changes to his water rights. The user sought those changes and the Department approved the changes temporarily. Based on the information presented to me at this point in time, I believe that the irrigation by Lezamiz is legal and in accordance with his temporary water right changes, except for the proper measurement of the re-diversion pump and lack of control at the well head. The Department therefore intends to send a notice to Lezamiz requesting that the measuring device on the re-diversion pump be corrected or replaced within ten days, and that an adequate control valve be installed on the well that is used to inject water to Congdon Springs. The Department will rescind the temporary change approval and instruct the watermaster to shut the re-diversion pump off if Lezamiz does not comply with these requests.

Please be advised that the temporary approval expires on October 31, 2007. Lezamiz must obtain a permanent water right transfer or other approval from the Department and have an operable measuring device before resuming use of the new pump station on Congdon Springs Creek. Lezamiz must also obtain a water right transfer or other approval from the Department to continue the diversion of ground water on more than 84 acres the half-circle pivot or the 47 acres that exceeds the 84 acres. The Department's current determination of the Lezamiz water use on Congdon Springs does not preclude you from protesting or challenging any permanent transfer applications that Lezamiz may file with the Department.

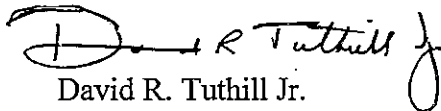
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**Water District 34 Water Distribution Rule 37.0312.040.03.b:**

The second issue raised in your letter concerns a disagreement over interpretation of Rule 040.03.b of the Water District 34 Water Distribution Rules. This issue has been litigated in the District Court for the Seventh Judicial Court of Idaho where the Department was asked to give its' interpretation and understanding of the rule. The Attorney General's Office argued the case on behalf of the Department, and the Department's position regarding this issue is a matter of record in the case. The Department's water right accounting program and procedures correctly proportions river reach conveyance losses between storage and natural flows in accordance with Rule 040.03.b. This is done to assure proper delivery of natural flow priority rights. The question in dispute is whether the irrigation district must follow the same procedures in how it allocates its own storage water. The District Court decided in favor of the irrigation district. The Department respects that decision unless overruled by a higher court.

Sincerely,

A handwritten signature in black ink, appearing to read "David R. Tuthill Jr.", with a stylized flourish at the end.

David R. Tuthill Jr.  
Director

Cc: Lane Jolliffe, Governor's Office  
John Lezamiz  
Ernie Carlsen, IDWR Easter Region  
Bob Schaeffer, Water District 34 Watermaster  
Tim Luke, Supervisor of Water Distribution